STATE OF MICHIGAN

COURT OF APPEALS

AARON SIBLEY, JR.,

Plaintiff-Appellant,

v

BORGESS MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
July 15, 2008

No. 277891
Kalamazoo Circuit Court
LC No. 06-000657-NZ

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Plaintiff Aaron Sibley, Jr. appeals as of right the trial court's order granting defendant Borgess Medical Center's motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). We affirm.

This case arises out of allegedly deficient nursing care plaintiff received after being admitted to defendant's cardiac unit for post-surgical observation following a heart catheterization procedure. More specifically, on December 11, 2004, plaintiff was taken to defendant's emergency room complaining of chest pain. He underwent a cardiac catheterization procedure and was admitted to the cardiac unit for post procedure observation. During the course of the next several hours, plaintiff twice illuminated his "call button" to request food; each time, he was brought crackers. Plaintiff alleges that he illuminated his call button a third time, to advise that he was bleeding from the site where the catheter had been inserted, but that there was no response. Some time later, plaintiff illuminated the call button for a fourth time and advised the responding nurse that he was bleeding from the catheterization site. A nurse then came to plaintiff's room, checked his pulse and, according to plaintiff, cleaned the catheterization site and changed plaintiff's clothing and bedding. Thereafter, plaintiff was taken to the intensive care unit. According to plaintiff, his treating nurse failed to disclose to the treating physicians in the intensive care unit that plaintiff had been bleeding from his catheterization site, which delayed his receipt of appropriate medical treatment, causing him to suffer residual effects resulting from his blood loss.

Plaintiff filed a four-count complaint, alleging claims of negligence, gross negligence, breach of contract and fraud or fraudulent concealment. The trial court granted defendant's motion for summary disposition, concluding that plaintiff's negligence, gross negligence and breach of contract claims actually were claims of medical malpractice, the statutory requirements for which plaintiff failed to meet. The trial court further determined that plaintiff's claim for

fraud or fraudulent concealment failed as a matter of law, because plaintiff did not allege that defendant's nursing staff made any material misrepresentation to plaintiff.

On appeal, plaintiff first argues that the trial court erred in determining that his claims for negligence and gross negligence[1] actually were claims of medical malpractice. We disagree.

This Court reviews this issue de novo, "consider[ing] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Bryant v Oakpointe Villa*, 471 Mich 411, 419; 684 NW2d 864 (2004). To determine the true legal nature of an action brought against a health care provider, we examine the claim as a whole and look beyond mere procedural labels to determine the exact nature of the claim alleged. *Tipton v William Beaumont Hosp,* 266 Mich App 27, 33; 697 NW2d 552 (2005); *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2007). As our Supreme Court explained in *Bryant,*

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "'within the course of a professional relationship.'" Second, claims of medical malpractice necessarily "raise questions involving medical judgment." Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id.* Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Id.* at 422 (citations omitted).]

Additionally, if a jury can evaluate the reasonableness of an action only after the presentation of expert testimony, the claim sounds in medical malpractice. *Id.* at 423; see also *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26, 46; 594 NW2d 455 (1999).

There is no issue that the conduct of which plaintiff complains – the actions of nursing staff who attended to plaintiff following his cardiac catheterization procedure – occurred within the context of a professional relationship. *Cox v Flint Bd of Hosp Managers,* 467 Mich 1, 19-22; 651 NW2d 356 (2002). Plaintiff does not argue otherwise. Hence, the dispositive question is whether plaintiff's claims raise "questions of medical judgment requiring expert testimony" or instead "allege[] facts within the realm of a jury's common knowledge and experience." *Bryant, supra* at 423; see also, *Johnson v Botsford Hospital*, 278 Mich App 146, 151-152; 748 NW2d 907 (2008).

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[1] Plaintiff does not address his arguments to the trial court's dismissal of his breach of contract claim.

Plaintiff alleges that defendant's nursing staff was negligent in failing to properly respond to his use of the "call button" and to accurately report information that plaintiff was bleeding from his catheterization site to plaintiff's treating physicians. Plaintiff opines that these actions did not require medical judgment. However, our Supreme Court has determined that "allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury." *Dorris, supra* at 47. Jurors cannot be expected to know the appropriate level of monitoring required for a patient in plaintiff's condition. Rather, resolution of this issue would require expert testimony as to the appropriate level of monitoring, the proper protocol for responding to patient requests, appropriate response times and staffing levels, and additional factors that might affect a nurse's response to patient requests, including factors such as patient priority and the risks associated with managing competing patient requests.

Similarly, whether it was appropriate to clean the blood from plaintiff's catheterization site and change his clothing and bedding, or whether there was some reason pertinent to his treatment to leave the site uncleaned and his blood-stained clothing and bedding in place, whether a physician should have been contacted immediately upon discovery that plaintiff had been bleeding, and whether the nursing staff conveyed appropriate information to plaintiff's physicians to facilitate his medical treatment, each required plaintiff's nurses to make medical judgments, and are not questions within "the common knowledge and experience of a jury." *Id.* Expert testimony would be required for their proper resolution. See, e.g., *David, supra* ("[D]iscerning infection, capillary flow, and the postsurgical condition of plaintiff's surgical site and identifying and treating plaintiff's medical condition are not within the realm of common knowledge").

The trial court correctly determined that plaintiff's claims for negligence and gross negligence were claims of medical malpractice. A plaintiff cannot avoid application of the procedural requirements attendant to a medical malpractice action by couching his claims in terms of negligence. *Dorris, supra* at 43; *David, supra* at 381-382. Because plaintiff failed to comply with the procedural requirements set forth in MCL 600.2912b, and because the statute of limitations for filing a medical malpractice action has now expired, the trial court properly granted defendant's motion for summary disposition.

Plaintiff also argues that the trial court erred in dismissing his claim for fraud or fraudulent concealment. We disagree.

We review a trial court's decision to grant summary disposition under MCR 2.116(C)(8) de novo, accepting all factual allegations in support of the claim as true. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

As this Court has noted,

> [a]ctionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that *the plaintiff* would act

> upon it; (5) *the plaintiff* acted in reliance upon it; and (6) *the plaintiff* suffered damage. [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003) (emphasis added, citation and internal quotation marks omitted).]

Here, plaintiff alleges that his treating nurse concealed that plaintiff had been bleeding from his catheterization site from his treating physicians; there is no allegation that any material misrepresentation was made to plaintiff, upon which plaintiff relied to his detriment. Therefore, the trial court correctly concluded that plaintiff failed to state an actionable claim for fraud.

We affirm.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering